86-767

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ALEJANDRO PEREZ,

Petitioner,

vs.

LAREDO JUNIOR COLLEGE, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

David T. Lopez
David T. Lopez & Assoc.
7660 Woodway - Suite 250
Houston, Texas 77063
(713) 266-5536

Attorney for Petitioner

QUESTION PRESENTED

Where a reply brief is timely filed and addresses material issues not previously argued and essential to the just determination of an appeal, is it error for the Court of Appeals, without notice, to decide the case before receiving and considering the reply brief?

PARTIES TO THE PROCEEDINGS

Alejandro Perez - Petitioner

Laredo Junior College - Respondent

Domingo Arechiga - Respondent

Board of Trustees of Laredo Junior College - Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Rules of Appellate Procedure:

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported. It is reproduced in the Appendix.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered July 9, 1986. A timely petition for rehearing filed by the Petitioner was denied August 14, 1986, and is reproduced in the Appendix. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves the proper interpretation of 28 U.S.C. § 2071 and Rules 2 and 28(c), Federal Rules of

Appellate Procedure.

28 U.S.C. § 2071 states as follows:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 2, Fed. R. App. P., states as follows:

"In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of the rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

Rule 28(c), Fed. R. App. P., states

as follows:

"Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of court."

STATEMENT OF THE CASE

Alejandro Perez, Petitioner, and hereafter referred to as Dr. Perez, sued in January of 1982 against his employer, Laredo Junior College, its President, and its Board of Trustees. He argued that the refusal of the College to recognize his doctoral degree because it dealt in particular with the concerns of Mexican-Americans constituted a violation of his civil rights, 28 U.S.C. § 1343.

To the limited extent that the factual circumstances are material to this petition, they are briefly discussed below to support Dr. Perez's contention that the procedural error of the court of appeals was harmful.

Briefly, the procedural history of the lawsuit is as follows. Respondents, hereinafter referred to as the College unless the context otherwise required, movedfor summary judgment, and a United States Magistrate recommended that the motion be denied. After additional briefing, the district court entered an order rejecting the Magistrate's memorandum and recommendation and granting summary judgment. A motion for reconsideration was denied and judgment of dismissal was entered on October 21, 1982.

Upon appeal by Dr. Perez, the

United States Court of Appeals for the Fifth Circuit reversed and remanded in part, Perez vs. Laredo Junior College, 706 F.2d 731 (5th Cir. 1983). Rehearing was denied by the Fifth Circuit, and this court denied the College's petition for writ of certiorari, Laredo Junior College vs. Alejandro Perez, 464 U.S. 1042, 79 L.Ed.2d 172 (1984).

After remand to the district court, the College again filed a motion for summary judgment on April 25, 1984. It was denied on August 2, 1984. On August 16, 1984, the College moved for reconsideration, and on September 19, 1984, the court denied the motion for reconsideration.

A joint pretrial order was filed on June 15, 1984. On August 19, 1985, the district court ordered Dr. Perez to state separately each theory of

recovery under 42 U.S.C. § 1983, asserting that the issues alleged were not clear to the court. Dr. Perez complied.

On September 21, 1985, the district court entered an order on sua sponte summary dismissal, giving the parties ten days to respond to the court's stated intent to dismiss the case.

Dr. Perez responded with a memorandum asserting that sua sponte summary judgment is not permitted in civil cases within the Fifth Circuit and complaining that the order of the court did not provide sufficient notice within the meaning of Rule 56, Fed. R. Civ. P. The College responded by filing a motion for judgment on the pleadings or, alternatively, for summary judgment.

Dr. Perez filed a memorandum in opposition to the motion of the College, stating various objections, including

an objection to the filing of the motion beyond the time permitted by the docket control order and requesting the court, if it intended to consider the motion, to provide notice and an opportunity to respond in detail.

Without further notice, the district court granted summary judgment on December 27, 1985. Dr. Perez appealed.

Dr. Perez timely filed his opening brief on appeal on April 3, 1986. The College filed its brief on June 17, 1986, after obtaining an extension of time. Dr. Perez filed his reply brief on July 2, 1986.

On July 9, 1986, the Fifth Circuit issued its opinion pursuant to its summary procedures. In accordance with the procedure of the Fifth Circuit, each of the circuit judges on the panel initialed the first page of the opinion,

indicating the date on which that circuit judge had approved the opinion. The initials showed that Judge Johnson approved the opinion June 21, 1986, Judge Randall on June 25, 1986, and Judge Davis on July 2, 1986.

A timely petition for rehearing was filed, directing the attention of the court to the procedural error and to the prejudice it occasioned Dr. Perez. Rehearing was denied.

REASONS FOR GRANTING THE WRIT

When a court of appeals fails to follow the procedural rules promulgated by the Supreme Court, and such failure constitutes prejudicial error, only the Supreme Court has the supervisory authority to correct the error and required compliance with the rules.

If the Supreme Court were to deny

review, it in effect would sanction an abrogation of the rule making process and the diminution of the role of the Supreme Court and the Congress in fashioning procedural rules of general application.

There is an additional substantive benefit for allowing the review of this case. There is a renewed attention and importance to the summary judgment procedure. Understandably, the federal courts have responded to the crushing demands on their time by giving new emphasis to a procedure designed to quickly and efficiently dispose of cases that can be resolved purely on matters of law.

Summary disposition of a case presenting material issues of fact not only is an unjust deprivation of a citizen's day in court, but it is

extremely inefficient. Here, the summary judgment at issue was rendered after the case had gone through an initial appeal and petition for review by the Supreme Court and the parties had completed all discovery and preparation for trial.

In this case, the Supreme Court not only has a vehicle for ensuing enforcement of its rules, but also for providing guidance in the proper utilization of summary procedures at both the the trial and appellate levels.

ARGUMENT

Dr. Perez has no quarrel with an appellate court's authority to control its calendar and expedite disposition of its cases.

When it chooses to do so, however, an appeals court must proceed in

accordance with Rule 2 of the Federal Rules of Appellate Procedure. That rule provides ample flexibility and discretion. When it is not followed, the inevitable result is to preclude the appellant from presenting his argument.

In this case, the appeal was decided erroneously because Dr. Perez was not given an opportunity to present his argument.

The district court decided the case basically on an issue of law, determining that discrimination against a Hispanic because of his academic interest in an area of interest limited to Hispanics could not constitute a denial of equal protection actionable under 42 U.S.C. § 1983.

Dr. Perez addressed his opening brief on appeal to this legal issue, mentioning only in passing the material

issues of fact presented by the case.

The Fifth Circuit, however, apparently was persuaded by the argument of the College that there were no material issues of fact since other Hispanics had been given credit for their doctoral degrees and the College required that in order to get credit the doctor's degree be in the faculty member's teaching area.

Essentially, Dr. Perez was precluded from showing that other faculty members whose doctoral degrees were outside their teaching area had been given credit for the degree and awarded additional pay.

To the extent that either the trial or appellate court, or both, considered it necessary for Dr. Perez to show a general pattern of discrimination against Hispanics in order to maintain his equal

protection claim, such a requirement was erroneous as a matter of law. A single showing of intentional discrimination suffices. Batson vs. Kentucky, _____ U.S. _____, 90 L.Ed.2nd 69 (1986).

This is, accordingly, not a complaint only about procedural error, but about a procedural error which was erroneously determinative of Dr. Perez's rights.

Courts of appeal have had no problem with adherence to the rules. Noting the 1958 Annual Report of the Proceedings of Judicial Conference of the United States and the stated purpose of the Appellate Rules Committee to, inter alia, "promote fairness in administration," the Second Circuit noted that deviation from the letter of the rules should be permitted only on the most compelling showing that this purpose

would be served. Orbitec Corporation vs. Schindler, 520 F.2d 358, 362 (2nd Cir. 1975).

In Groendyke Transport, Inc. vs. Davis, 406 F.2d 1158, 1161 (5th Cir. 1969), the Fifth Circuit itself recognized the purpose of Rule 2 and the limitation that its application be "consistent with a fair opportunity to the parties to advance and counter arguments and contentions."

In this case, the Fifth Circuit well may have acted inadvertently motivated by a desire to expedite the decisional process. Whether intentional or not, the procedure was inconsistent with a fair opportunity to Dr. Perez to advance and counter arguments and contentions, and under the Circuit's own standards the procedure cannot stand uncorrected.

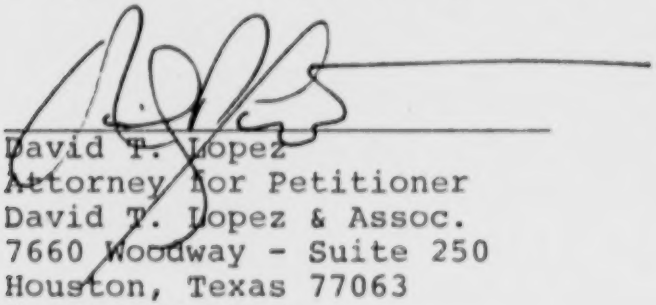
The issue is simple and determination of this case would not require extensive argument. The result of review and action by the Supreme Court has the potential, however, of encouraging prompt and efficient disposition of cases, while ensuring that the decisional process and the ends of justice are not disserved.

CONCLUSION AND PRAYER

Only this Court can exercise supervisory authority to correct the prejudicial error in the Court of Appeals. For that reason alone, a review is required. However, review also would provide an opportunity to address the area of summary procedure to ensure that it is utilized to further, not delimit the administration of justice. Writ of certiorari should issue. Dr.

Perez believes that upon review this Court will reverse the judgment of the Fifth Circuit and remand this case for a proper disposition on the merits in accordance with the rules.

Respectfully submitted,



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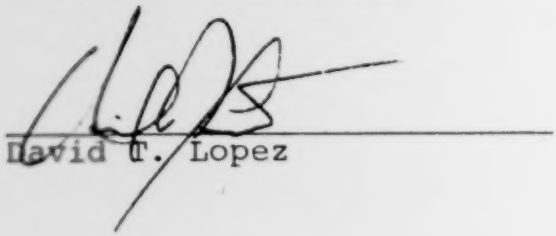
CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that three copies of this petition for writ of certiorari were served this 11th day of November 1986 by placing them in the United States mail, first class postage prepaid, addressed to the Respondents' counsel of record,

H. C. Hall, III, Esquire, at his post office address, P. O. Box 207, Laredo, Texas 78042, in accordance with Rule 28.3 of the Rules of this Court.



David T. Lopez

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-2065
Summary Calendar

D.C. Docket No. CA-L-82-1

ALEJANDRO PEREZ,

Plaintiff-Appellant,

versus

LAREDO JUNIOR COLLEGE,
ET AL.,

Defendants-Appellees.

Appeal from

the United States District Court

for the Southern District of Texas

Before RANDALL, JOHNSON, and DAVIS,

Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 9, 1986

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-2065

ALEJANDRO PEREZ,

Plaintiff-Appellant,

versus

LAREDO JUNIOR COLLEGE,
ET AL.,

Defendants-Appellees.

Appeal from

the United States District Court

for the Southern District of Texas

ON PETITION FOR REHEARING
(August 14, 1986)

Before RANDALL, JOHNSON, and DAVIS,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(Carolyn Dineen Randall)
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-2065
Summary Calendar

ALEJANDRO PEREZ,

Plaintiff-Appellant,

versus

LAREDO JUNIOR COLLEGE,
ET AL.,

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Appeal from

the United States District Court

for the Southern District of Texas

(July 9, 1986)

Before RANDALL, JOHNSON and DAVIS,

Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Alejandro Perez appeals from the district court's order granting the defendant's motion for summary judgment. We affirm.

I.

Alejandro Perez teaches at Laredo Junior College (the College), where he has been a member of the faculty since 1968. He brought suit in January, 1982, claiming that the College had discriminated against him by declining to increase his compensation after he received his Ph.D.

Perez teaches mathematics. In 1977, he received a Ph.D. from the University of New Mexico; the degree is in educational administration, and Perez's doctoral work focused on the needs and concerns of Mexican-American students. After obtaining this degree, Perez sought additional compensation pursuant to the College's policy of granting a

salary increase to faculty members who receive their doctorates. The department head denied Perez's request, explaining that the College's policy applies only when the advanced degree is in the instructor's teaching field or a closely related field. Perez appealed this decision several times, first to the college dean, then to an ad hoc committee, next to the College president, and finally to the Board of Trustees. Each denied his request. Perez then filed suit, but the district court dismissed the action on the grounds that the statute of limitations had run. This court affirmed in part and reversed in part and remanded. Perez v. Laredo Junior College, 706 F.2d 731 (5th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). We remanded the case so the district court could consider Perez's claim that

he suffers from a continuing denial of equal protection.

Perez explained below and repeats on appeal that his claim involves two elements: that he was discriminated against because he is Mexican-American, and, more centrally, that he was denied a salary increase because the subject matter of his doctoral work concentrated on Mexican-American people and culture. The College moved for summary judgment. The district court denied the College's motion as well as its subsequent motion for reconsideration. However, the court then ordered Perez "to state separately each theory of recovery under 42 U.S.C. Section 1983." The court gave Perez fifteen days to comply with this order, and following Perez's answer, the court indicated to the parties, in a written order, that it was considering sua sponte dismissal of Perez's

claims. The court gave the parties ten days to respond. Perez filed a memorandum in opposition. The College filed a motion for judgment on the pleadings or, alternatively, for summary judgment, to which Perez filed a response. The district court then granted summary judgment in favor of the College.

Perez now argues that the district court erred since sua sponte dismissal is disapproved of in this Circuit. In addition, Perez asserts that summary judgment was inappropriate in this case.

II.

Initially we must dispose of Perez's assertion that the district court erred procedurally by dismissing the case sua sponte. Pointing to Jones v. Estelle, 692 F.2d 380, 384 n. 5 (5th Cir. 1982), and Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387, 391

(5th Cir. 1980), Perez contends that the district court's handling of this case is at odds with this Circuit's disapproval of sua sponte dismissals. We do not agree. When a court grants summary judgment sua sponte, it does so either without a motion by any of the parties or without affording the parties adequate time to respond. See J. Moore, Moore's Federal Practice ¶ 56.14[1] n. 24, at 56-356, 56-357. In this case, the College did file a motion, and once the district court began contemplating dismissal, it so advised the parties and provided them with time to respond.

In Capital Films, on which Perez heavily relies, the district court granted summary judgment with respect to elements of the plaintiff's complaint which had been added to the complaint after the defendant's motion for summary judgment

had been filed. Thus, the district court granted summary judgment even with respect to certain claims which the motion had not addressed; effectively, therefore, there was no motion at all concerning these claims. In reversing the district court's judgment, we did so only with respect to those claims which had been added to the complaint after the motion for summary judgment had been filed. 628 F.2d at 691. As Capital Films makes clear, the point of this court's admonitions against sua sponte dismissals is that it is unfair to litigants to dismiss a case without giving them adequate warning and an opportunity to respond.

These concerns are not implicated by this case in which, despite the district court's denomination of its action as sua sponte dismissal, the court was

in essence reconsidering its previous denial of the College's motion for summary judgment. The cogency of the College's motion simply did not become clear to the court until Perez delineated with specificity the essence of his § 1983 claims. Furthermore, the district court gave Perez ample time to respond to the statement that it was considering dismissal, and Perez filed a response both to the court's statement and to the College's renewed motion. The procedure employed by the district court was not improper, so we turn to a consideration of the merits of the decision granting summary judgment.

III.

Summary judgment is appropriate under Fed. R. Civ. P. 56(c) when there is no genuine issue as to any material fact and . . . the moving party is

entitled to judgment as a matter of law." The burden is on the moving party to show that these conditions are satisfied. United States Steel Corp. v. Darby, 516 F.2d 961 (5th Cir. 1975). The party opposing the motion "may not rest upon the mere allegations . . . of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Aladdin Oil Co. v. Texaco Inc., 603 F.2d 1107, 1112 (5th Cir. 1979). Once the movant has met its burden, "the opposing party must be diligent in countering a motion for summary judgment . . . and . . . mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146, 150 (5th Cir. 1979). In short, the party

opposing the motion must proffer "sufficient evidence . . . to require a judge or jury to resolve the parties' differing versions of the truth at trial." First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 289 (1968).

The summary judgment evidence in the record belies each of Perez's assertions. The College's rules and regulations provide that only teachers whose Ph.D.s are in their teaching fields or closely related areas are entitled to an increase in salary after receiving the advanced degree. Perez's degree is obviously outside of and unrelated to his teaching field. The summary judgment evidence attached to the College's motion, moreover, included a sworn statement that the reason Perez did not receive a salary increase was because his Ph.D. is unrelated to his teaching area. In

addition, interrogatory answers established that of the five professors whom Perez listed as receiving salary increases while he did not, three are Mexican-American; of these three hispanic professors, two have doctoral degrees in fields related to hispanic people or culture. All five of the teachers referred to in Perez's complaint have Ph.D.s in their teaching fields or in closely related areas. All of this summary judgment evidence was uncontroverted. Perez did not meet his burden of proffering sufficient evidence to require that the trier of fact resolve differing versions of the truth. Accordingly, the judgment of the district court is AFFIRMED.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

ALEJANDRO PEREZ	§	
V.	§	C.A. NO. L-82-1
LAREDO JUNIOR COLLEGE, ET AL.	§	
	§	

ORDER GRANTING SUMMARY JUDGMENT

Defendants filed a motion for summary judgment on April 25, 1984, and a motion for reconsideration of this Court's August 2, 1984, denial of that motion, on August 17, 1984. The motion for reconsideration was also denied, on September 19, 1984. Defendants have again moved for summary judgment on identical grounds.

Since its initial consideration and denial of Defendants' motions, it has become apparent to this Court that the Defendants are correct in their assessment of the Plaintiff's 42 U.S.C. § 1983 cause of action. This Court requested a

clarification from Plaintiff after reviewing the Pretrial Order. In the Pretrial Order, Plaintiff states a 42 U.S.C. § 1983 equal protection cause of action. On page 4 of the Pretrial Order, Plaintiff, who teaches mathematics at Defendant Junior College, states that "the subject matter of his dissertation involving the problems of Mexican-American students was one of the motivating factors behind Defendant Trustees' and Defendant Arechiga's decision to deny him additional compensation" despite his doctoral degree. Nowhere in the Pretrial Order does Plaintiff state that he was discriminated against because of his national origin. Earlier, in his Memorandum in Opposition to Defendants' Motion for Summary Judgment, Plaintiff, referring to Plaintiff's answer to Defendants' Interrogatory No. 4 stated:

> The only difference between Plaintiff and other similarly-situated faculty members was a combination of his ethnic origin, Hispanic, and the relationship which his terminal degree bore to the Hispanic people and culture.

The uncontroverted summary judgment evidence presented by Defendants establishes that three of the five professors who Plaintiff contends were treated differently than Plaintiff are also Mexican-American, and that the doctoral degrees of all five of these professors was in their teaching field, unlike the Plaintiff's doctoral degree. The doctoral degrees of two of the three Hispanics in the group were based on work dealing with Hispanic people and culture. See affidavit of D. Arechiga, President of Laredo Municipal Junior College. In addition, the Plaintiff's departmental chairperson, the three college deans, and the president of the college were all Mexican-Americans. Id.

In response to the Court's request to clarify the issues alleged to involve 42 U.S.C. § 1983, Plaintiff stated:

> The Plaintiff, Dr. Perez, specifically claims that the Defendants have refused to pay him in recognition of his doctoral degree, while recognizing the doctoral degrees of other similarly-situated faculty members, because his doctoral degree and dissertation dealt with problems and issues of interest to Mexican-Americans.

Based on this response, the Pretrial Order, the motion for summary judgment and other materials already on file, this Court advised the parties on September 21, 1985, that summary dismissal under Rule 56, Fed. R. Civ. P., was contemplated. See Brumley Estate v. Iowa Beef Processors, Inc., 704 F.2d 1351, 1358 (5th Cir. 1983). On October 2, 1985, Defendants filed a Motion for Judgment on the Pleadings and in the Alternative for Summary Judgment grounded on Plaintiff's failure to allege and inability to prove

discrimination by reason of Plaintiff's national origin.

Despite these additional opportunities to clarify his cause of action, Plaintiff has failed to convince this Court of the existence of a § 1983 equal protection cause of action. The Fifth Circuit, in Castaneda v. Pickard, 658 F.2d 989, 1000 (5th Cir. 1981), set forth the burden of proof for § 1983 equal protection causes of action:

> With regard to the Plaintiff's claims based on ... the Equal Protection Clause, we note that it is now well-established that, in order to assert a claim based upon unconstitutional racial discrimination, a party must not only allege and prove that the challenged conduct had a differential or disparate impact upon persons of different races, but also assert and prove that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action intended to treat similarly-situated persons differently on the basis of race. Personnel Administrator of Massachusetts v. Feeney, 99 S.Ct. 2282 (1979);

> Village of Arlington Heights v. Metropolitan Housing Development Corporation, 97 S.Ct. 555 (1977); Washington v. Davis, 96 S.Ct. 2040 (1976). Thus, discriminatory intent, as well as disparate impact, must be shown in employment discrimination suits brought against public employers under ... § 1983.

To the extent that Plaintiff's lawsuit is based on the subject matter of his doctoral dissertation, there is no 42 U.S.C. § 1983 equal protection cause of action. Even if Plaintiff's lawsuit is based on the combination of his being Mexican-American and his writing about Mexican-Americans, the summary judgment proof provided by Defendants establishes that Plaintiff cannot prevail because he cannot meet his burden of showing discriminatory intent and disparate impact. No genuine issues of material fact exist as to Plaintiff's burden of proof.

The Plaintiff has had ample notice and several opportunities to clarify his

§ 1983 theory of recovery and to present competent summary judgment evidence. See this Court's orders of August 19 and September 24, 1985, Defendants' motion filed October 2, 1985, and Plaintiff's responses filed August 30, September 30, and October 7, 1985.

Plaintiff incorrectly characterizes the holding of the Fifth Circuit in Perez v. Laredo Junior College, 706 F.2d 731, 734 (5th Cir. 1983), cert. denied, 104 S.Ct. 708 (1984), as precluding summary judgment on the merits. That case dealt only with application of the Texas two-year statute of limitations to plaintiff's claims. The Fifth Circuit held only that this Court had failed to consider, in ruling on the statute-of-limitations issue, whether, in alleging an equal protection violation, the plaintiff asserted a continuing violaton not barred

by the two-year statute of limitations. The statue of limitations is not now at issue. The present motion for summary judgment successfully challenges the merits of Plaintiff's equal protection claim. As discussed above, there is no longer any reason for this case to go to trial.

Accordingly, summary judgment is granted for Defendants. Since the federal claim is dismissed before trial, this Court declines, under the rule of United Mine Workers v. Gibbs, 86 S.Ct. 1130, 1139 (1966), to exercise pendent jurisdiction over Plaintiff's state law claims. The state law claims are dismissed.

ORDERED this 27 day of December, 1985.

(H. W. Head, Jr.)
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

ALEJANDRO PEREZ	§	
V.	§	C.A. NO. L-82-1
LAREDO JUNIRO COLLEGE, ET AL.	§	
	§	

FINAL JUDGMENT

Based on its Order Granting Summary Judgment, the Court hereby grants Defendants' Motion for Summary Judgment and renders judgment for Defendants, with their costs.

ORDERED this 27 day of December, 1985.

(H. W. Head, Jr.)
HAYDEN W. HEAD
UNITED STATES DISTRICT JUDGE

(2)

No. 86-767

In The
Supreme Court of the United States
October Term, 1986

ALEJANDRO PEREZ,

Petitioner,

vs.

LAREDO JUNIOR COLLEGE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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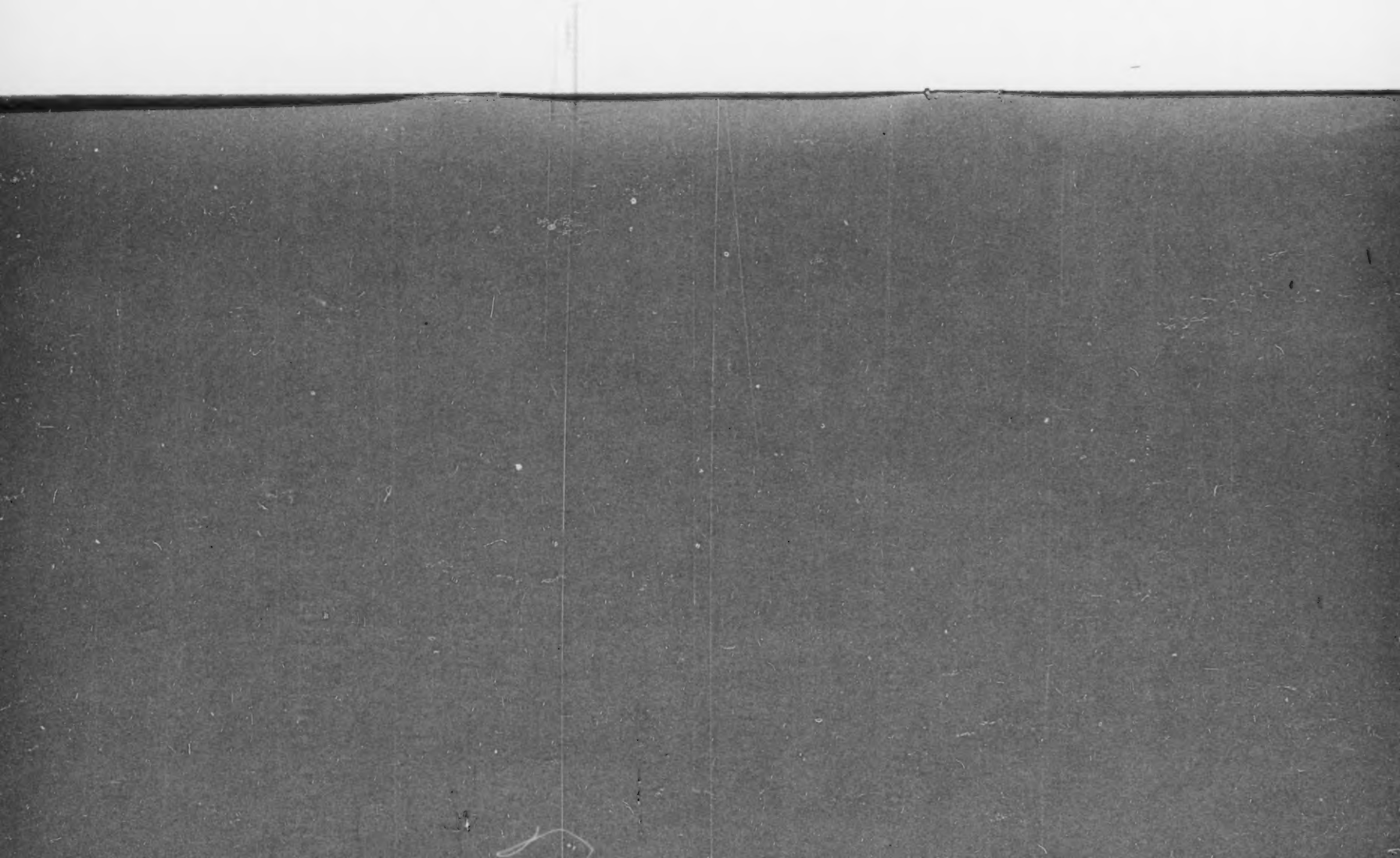

QUESTIONS PRESENTED BY PETITIONER

Where a reply brief is timely filed and addresses material issues not previously argued and essential to the just determination of an appeal, is it error for the Court of Appeals, without notice, to decide the case before receiving and considering the reply brief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Statutes

No. 86-767

—o—

In The
Supreme Court of the United States
October Term, 1986

—o—

ALEJANDRO PEREZ,

Petitioner,

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LAREDO JUNIOR COLLEGE, *et al.*,

Respondents.

—o—

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

—o—

RESPONDENTS' BRIEF IN OPPOSITION

—o—

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Laredo Municipal Junior College District, Domingo Arechiga and the Board of Trustees of the Laredo Municipal Junior College District, respectfully re-

quest that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case.

———o———

GROUNDS FOR JURISDICTION

This Court's jurisdiction is predicated upon 28 U.S.C. Section 1254 (1).

———o———

STATEMENT OF THE CASE

In addition to the Petitioner's Statement of the Case, Respondents would add that in Petitioner's (Appellant below) brief on the merits, filed in the Fifth Circuit, and in Respondents' (Appellees below) reply brief, the parties in effect agreed, pursuant to Rule 34 (f), F.R.A.P., to waive oral argument and submit the case to the Fifth Circuit on the respective briefs.

———o———

ARGUMENT

Petitioner contends that because the opinion by the panel of the Fifth Circuit deciding the case below, was written and initialed by the three judges before (and in the last instance on the same day) the Petitioner filed his Reply Brief in the Fifth Circuit, that the Fifth Circuit committed reversible error in deciding the case prior to considering his Reply Brief. There is no evidence that

the panel members did not consider the Reply Brief before the opinion was released, and in fact Respondents' counsel is advised that the "opinion writing" member of a panel in the Fifth Circuit is consistently furnished copies of all Reply Briefs immediately after same are filed, and in this case would have been furnished such Reply Brief by no later than two days prior to the release of the opinion. Irrespective of whether or not one or all of the panel members were furnished or considered such Reply Brief prior to the release of the opinion, Petitioner thereafter filed a Motion for Rehearing (a copy of which is reproduced in the Appendix hereto). If the panel deciding the case below did not have the benefit of Petitioner's Reply Brief before initially deciding the case and issuing its opinion, the same panel was expressly made aware of the contents of such Reply Brief, as well as the same procedural complaint now advanced by Petitioner. The panel after being made so aware and having an opportunity to consider Petitioner's additional arguments, denied the Motion for Rehearing. The trial court below determined that no material issue of fact was raised by the summary judgment evidence and that Respondents were entitled to summary judgment. The Fifth Circuit after reviewing the record, concurred and affirmed the judgment. Petitioner has not been denied any procedural or substantive right. Petitioner has had ample opportunity to advance all of his arguments, contentions and counter-arguments, and has had the trial court and the Fifth Circuit pass on same.

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CONCLUSION

Petitioner has failed to show any error on the part of the Fifth Circuit which affects his rights, and his Petition for Writ of Certiorari should accordingly be denied.

Respectfuly submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2065

ALEJANDRO PEREZ,

Plaintiff-Appellant,

vs.

LAREDO JUNION COLLEGE, ET AL.,

Defendants-Appellees.

APPELLANT ALEJANDRO PEREZ'S PETITION FOR REHEARING

Alejandro Perez, the Appellant, respectfully petitions the panel for rehearing and reconsideration of its opinion.

The opinion rendered by this Court shows on its face that it was made prior to and without consideration of the reply brief of the Appellant.

No order altering the briefing schedule, nor otherwise expediting the appeal, was entered. Accordingly, the decision by the Court was inconsistent with the provisions of the Federal Rules of Appellate procedure. It also was inconsistent with the published Internal Operating Procedures of the Court, which call for screening of a case only after the briefing has closed.

Specifically, the record shows that the reply brief was filed July 2, 1986. The opinion is endorsed on its face with the initials of the three members of the panel, bearing dates of June 21, 1986, June 25, 1986, and July 2, 1986. (The Appellee's brief was filed June 17, 1986).

Had the Court considered the reply brief, it would have had to reach contrary conclusions on the two central points in its opinion.

First, the Court characterizes the granting of summary judgment as an action of reconsideration, not sua sponte action by the Trial Court. This Court states that Dr. Perez had an opportunity to respond and did respond to the proposed action by the Court. Such a conclusion thoroughly is illogical, as demonstrated in the reply brief. The response by Dr. Perez was precisely to request that fair notice be given as to what the Court contemplated: "It is respectfully requested that if the Court is to give consideration to the motion of the Defendants that notice be provided to the Plaintiff, together with an opportunity to file a response." Rec. Exc. at 56.

Dr. Perez was not complaining about any perceived need for additional time. He specifically protested because the statement by the Court did not provide sufficient notice with respect to the issue to be considered.

The compounding in this Court of a denial of an opportunity to present an argument with respect to the denial of the opportunity to present an argument below constitutes a manifestly unfair deprivation of due process.

Secondly, the opinion of the Court oversteps the bounds of summary judgment procedure to invade the fact finding province of the jury. Thus, this Court states: "Perez's degree is obviously outside of and unrelated to his teaching field." Opinion at p. 6.

The opinion of this Court, and its factual recitation, accurately sets forth that Dr. Perez has been assigned to

teach mathematics and received a Ph.D. degree in educational administration. Opinion p. 2.

In the reply brief, the Plaintiff demonstrates that the summary judgment evidence before the Court showed that another math professor had received additional pay for a Ph.D. in education. Dr. Perez's Reply Brief at p. 8.

Dr. Perez must conclude that the Court was unaware, not having read his reply brief, of the blatantly different treatment accorded an undisputedly similarly situated faculty member. How else can one explain the bold conclusory assertion by this Court, at p. 7 of the Opinion, "All five of the teachers referred to in Perez's complaint have Ph.D.s in their teaching fields or in closely related areas."

Consider the others, mentioned in Dr. Perez's Reply Brief at pp. 8-9. Dr. Trevino taught reading and received his Ph.D. in educational administration. Dr. Olson taught history, but received a degree in teaching. Dr. Sanchez taught English, but got his doctor's degree in Spanish.

Even assuming that this Court strenuously disagrees with Dr. Perez's conclusion that it would take an impossible leap of logic to relate the doctorate fields to the teaching areas in these cases, this determination is one of fact. It is inappropriate to determine by summary judgment. Dr. Perez is entitled to the jury which he timely requested.

Conclusion and Prayer

Expediting appellate decisions is a truly worthwhile goal. The rules provide devices by which the parties or the Court can engage in such an endeavor. Dr. Perez, like all other parties before this Court, however, is entitled to rely upon and have the benefit of the applicable rules.

The rules permitted him to present and have considered a reply brief. Failure to consider the reply was prejudicial in that it resulted in a totally unsupportable opinion. This petition for rehearing should be granted, the opinion vacated, and the case given the due consideration it deserves.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1986, a true copy of the foregoing Appellant Alejandro Perez's Petition for Rehearing was served on the attorney in charge for Defendants-Appellees by placing same in the United States mail postage prepaid and properly addressed as follows:

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